IN THE
Supreme Court of the United States
October Term, 1984

No. 84-184 (5)

WILLIAMS PIPE LINE COMPANY,
Petitioner
v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents

No. 84-185 (4)

ASSOCIATION OF OIL PIPE LINES,
Petitioner
v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents

No. 84-186 (4)

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner
v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: October 29, 1984

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QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded the proper scope of judicial review of an agency's decision?

2. Whether the Court of Appeals denied Williams Pipe Line Company due process with regard to the purchase price issue raised by that company?

3. Whether the Court of Appeals' affirmance of the Commission's decision to require the rate base deduction of accumulated deferred tax amounts deprives oil pipelines of benefits that Congress intended to confer?

PARTIES TO THE PROCEEDINGS BELOW

The following parties appeared in the proceedings before the Court of Appeals:

Farmers Union Central Exchange, Inc.
Farmland Industries and its subsidiary, CRA, Inc.
Kerr-McGee Refining Corporation
Land O'Lakes, formerly Midland Cooperatives, Inc.
National Cooperative Refinery Association
Williams Pipe Line Company
Association of Oil Pipe Lines
Phillips Pipe Line Company
ARCO Pipe Line Company
Mid-America Pipeline Company
Marathon Pipe Line Company
Buckeye Pipe Line Company
Hydrocarbon Transportation, Inc.
Texas Eastern Transmission Corporation
Belle Fourche Pipe Line Company
Getty Pipeline, Inc.
Sun Pipe Line Company
Federal Energy Regulatory Commission
United States of America

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents Farmers Union Central Exchange, Inc., *et al.* ("Mid-Continent Shippers") respectfully sumbit this Brief in Opposition to the Petitions for Writ of Certiorari filed by petitioners Williams Pipe Line Company ("WPL"),

Texas Eastern Transmission Corporation ("Texas Eastern"), and Association of Oil Pipelines ("AOPL") in the above-named cases. The opinion of the Court of Appeals which is the subject of the petition, *Farmers Union Central Exchange v. FERC* (*"Farmers Union II"*), is reported at 734 F.2d 1486 (D.C. Cir. 1984) and is reproduced as Appendix A to the Petition of the AOPL.[1] Because the central issues and arguments presented in these Petitions are substantially similar, the Mid-Continent Shippers have consolidated their response to the three Petitions in this Opposition Brief.

The Mid-Continent Shippers are an unaffiliated grouping of corporations that tender petroleum products to Williams Pipe Line Company from origins in Oklahoma and Kansas to destinations in the Midwest and North Central states. In addition to the respondent Farmers Union Central Exchange whose name appears in the caption, other respondents in this group of shippers include Kerr-McGee Refining Corporation, Farmland Industries, Inc. and National Cooperative Refinery Association. The Mid-Continent Shippers were participants in the proceedings before the Federal Energy Regulatory Commission ("Commission" or "FERC") and appellants in opposition to the decision of the Commission before the United States Court of Appeals for the District of Columbia Circuit.

The Mid-Continent Shippers accept the citations to the opinion below, statements of jurisdiction, and citations to the relevant statutory provisions offered by the petitioners. The Mid-Continent Shippers' Statement of the Case and its reasons for denying the Petitions for Writ of Certiorari are set forth below.

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[1]All appendix references are to the appendices included in the Petition for Writ of Certiorari of Association of Oil Pipelines, No. 84-185.

STATEMENT OF THE CASE

The present decision under review is another chapter in a nearly 13-year-old controversy that necessarily will continue regardless of the disposition of the pending Petitions for Writ of Certiorari. It will continue because the justness and reasonableness of the pipeline charges of petitioner WPL remain to be tested under a regulatory methodology approved by the courts.

This case began at the Interstate Commerce Commission ("ICC") in 1971 and, following hearings and administrative decision in the mid-1970's, reached the court of appeals. Jurisdiction over oil pipeline rates was transferred to the Federal Energy Regulatory Commission while appellate review was pending. In the first federal judicial foray into the area of oil pipeline ratemaking the Court of Appeals for the District of Columbia Circuit found the ICC's ratemaking methodology unexplained, seemingly lacking in economic rationale, and the apparent product of a bygone ratemaking era. That court remanded the case to the FERC "to build a viable modern precedent for use in future cases that not only reaches the right result, but does so by way of ratemaking criteria free of the problems that appear to exist in the ICC's approach." *Farmers Union Central Exchange v. FERC,* 584 F.2d 408, 421 (D.C. Cir. 1978) ("*Farmers Union I*"). WPL then unsuccessfully sought a petition for writ of certiorari. *Williams Pipe Line Company v. FERC,* 439 U.S. 995 (1978).

Pursuant to the *Farmers Union I* remand, extensive hearings were held before a FERC administrative law judge during late 1979. Shortly thereafter the FERC, claiming a need for an expedited decision, took away the authority of the presiding judge to issue an initial decision. 10 FERC ¶61,023 (1980). Although the FERC previously had assured the Court of Appeals that it would decide the

case "with dispatch" (584 F.2d at 421-22), a decision was not forthcoming even after two oral arguments almost 1½ years apart. As late as July, 1982, FERC attributed its failure to issue a decision, *inter alia,* to its lack of familiarity with oil pipelines. 20 FERC ¶61,044 (1982).

The Mid-Continent Shippers had to seek judicial action to force the FERC finally to issue a decision. Finding that FERC had unlawfully withheld and unreasonably delayed a decision in violation of the Interstate Commerce Act, 49 U.S.C. §1, *et seq.,* and the Administrative Procedure Act, 5 U.S.C. §551, *et seq.,* the District Court for the District of Columbia ordered the Commission to issue its long awaited decision., *Farmers Union Central Exchange v. FERC,* 557 F. Supp. 34 (D.D.C. 1982). That decision was issued on November, 1982, over four years after the remand. Opinion No. 154, *Williams Pipe Line Co.,* Docket No. OR79-1-000, 21 FERC ¶61,260 (1982) (App. B-1).

The purport and tenor of the FERC's decision can be appreciated only by a reading of that lengthy document. Essentially, the Commission reached the conclusion that the just and reasonable standard for oil pipeline ratemaking under the Interstate Commerce Act (49 U.S.C. §1(5)) is not a public utility reasonableness standard, but an effort to restrain only "gross overreaching and unconscionable gouging." (App. B-128). The Commission's statutory conclusions led it to retain the rate base valuation methodology inherited from the ICC even though the Commission admitted that such methodology had many shortcomings. (App. B-184-185). The FERC then created a rate of return methodology suggested by no party to the administrative proceedings. The result was a ratemaking scheme that the FERC openly acknowledged would merit regulatory intervention only in cases of "egregious exploitation and gross abuse." (App. B-284).

A unanimous Court of Appeals for the District of Columbia Circuit, in a detailed and methodical analysis of the FERC's decision, found that decision to be arbitrary and capricious. *Farmers Union II.* The Court's conclusion was based in large part upon the FERC's failure properly to interpret the intent and meaning of the Hepburn Act amendments of 1906 (34 Stat. 584) which brought oil pipelines under the jurisdiction of the ICC. (App. A-42). Importantly, the Court of Appeals found that the practical effect of the Commission's decision would have been to deregulate the oil pipeline industry in direct contravention of the requirements of the Interstate Commerce Act. (App. A-43, 48).

In addition, the Court of Appeals found that many of the statements and conclusions of the FERC were not supported at all by any record evidence. (App. A-17 n.27; A-34, 44-45 n.50). Indeed, in its 400-page decision the Commission never once cited directly to the record. (*Cf.* App. A-45 n.50). Only after finding the FERC decision lacking in rationale did the Court of Appeals then proceed to offer guidance to the Commission for consideration on remand.

The FERC did not ask for rehearing of the Court of Appeals' decision nor did it petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Fully Comports With the Standards of Appellate Review Established by this Court

As this Court has recently affirmed, a valid agency decision must not be arbitrary and capricious, must involve consideration of the relevant factors and be free of clear errors of judgment, must rely upon factors which Con-

gress has intended it to consider, and must give due consideration to alternatives presented to it. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company,* ____ U.S. ____, 77 L.Ed.2d 443, 458, 463 (1983) ("*MVMA*"). The Court of Appeals' decision in *Farmers Union II* tested the Commission's Opinion 154 by these standards and found it severely deficient. A review of the meticulous and closely reasoned Court of Appeals' decision, in conjunction with the agency decision itself, demonstrates that the Court of Appeals has dictated neither a fixed procedure or result, nor its own concepts of public policy or ratemaking. Moreover, the court's rejection of the rate base methodology offered by FERC reaffirms the judgment of its prior decision in *Farmers Union I,* in which it found the ICC's valuation methodology (adopted nearly *in toto* by FERC) to be rife with "infirmities." *Farmers Union I,* 584 F.2d at 417-421.

Despite claims by petitioners that the Court of Appeals blatantly attempted to impose its own views of good policy and appropriate ratemaking methodology upon the Commission, an objective reading of the court's decision reveals no such problem. It was the Commission's utter failure to articulate and defend a rational ratemaking methodology that prompted the Court of Appeals to reject the proffered methodology. The guidance it provided the Commission *after* finding the Commission's decision arbitrary and capricious was provided to aid FERC in the remand proceedings. Significantly, FERC has not joined petitioners in their claim of error in the standard of review.

Petitioners' mischaracterization of both the Court of Appeals' decision and the underlying agency decision is substantial. First, although petitioners focus upon the court's discussion of FERC's flawed ratemaking method-

ology, they largely ignore the statutory analysis by which the court found that FERC's stated goals and ratemaking standards fundamentally contravened the Interstate Commerce Act's requirement that rates be "just and reasonable"; the court having held that remand is justified on this ground *alone.*[2] (App. A-50) (emphasis added).

The FERC's ratemaking standard effectively would have deregulated the industry. (App. A-43, 48). Based upon a very careful analysis of the legal principles governing agency discretion in setting rate standards, and a careful examination of substantial legislative history which had been ignored by the agency, (App. A-36-43), the court found that the agency's standard of "just and reasonable" plainly contravened the statute. This decision did not involve the injection of the court's views on policy, but rather a balanced and reasoned statutory interpretation that had been lacking in the agency's decision.[3]

The petitioners' mischaracterization is perhaps best illustrated by their improper claims that the Court of Ap-

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[2]FERC had found that the guiding command of the statute that rates be "just and reasonable" was a "mere vessel into which meaning must be poured." (App. B-101). Based upon unsupported assumptions of competition, FERC also had found that the standard connoted only "ordinary commercial 'reasonableness'," and "an effort to restrain *gross* overreaching and *unconscionable* gouging." (App. B-128) (emphasis added).

[3] Petitioner Texas Eastern also erroneously contends that the "end result" test of *FPC v. Hope Natural Gas Company,* 320 U.S. 591 (1944), deprives the Court of Appeals of jurisdiction to review a generic ratemaking decision merely because a specific rate is not at issue. (Texas Eastern at 5-8). As the court found, the decision was ripe for review, *Farmers Union II* at 1498, n.38. Moreover, this Court has itself reviewed courts of appeals' decisions involving generic ratemaking decisions which do not involve particular rates for any particular regulated company. See, *FPC v. Texaco,* 417 U.S. 380 (1974).

peals required the agency to conform its ratemaking methodology to a rigid "original cost" "public utility" framework (AOPL at 20; WPL at 8-9).[4] The Court of Appeals, of course, did not require the use of original cost ratemaking nor any other specific ratemaking formula.[5] Indeed, the court found the FERC's decision arbitrary and capricious because, *inter alia,* it did not adequately explain the rationale for rejecting changes to the *valuation* ratemaking formula advocated by industry members. (App.

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[4]Petitioner WPL urges at great length that the Court of Appeals erred in failing to recognize that the Valuation Act (49 U.S.C. §19a) mandated use of an ICC-type rate base. (WPL at 17-25). After *Farmers Union I* had rejected this same argument, FERC itself explicitly stated that the "ICC-FERC Oil Pipeline Valuation" was not mandated by statute. (App. B-185).

[5]This Court should find revealing the conflicting statments made by WPL in different pleadings concerning the holding in *Farmers Union II.* In its petition before this Court, WPL had this to say:

> Finally, the Court of Appeals has turned the teaching of this Court in the *Hope* case on its head. Where the Court, in *Hope,* freed regulators from strict requirements as to ratemaking methodology, the Court of Appeals would hold FERC to the use of a single methodology — original cost. The Court of Appeals has plainly confused what is permissible with what is mandatory. WPL at 8-9.

Less than two months later in a pleading before the FERC involving a rate increase, WPL had a far different view of the holding in *Farmers Union II:*

> Williams recognizes that the Court of appeals remanded Phase I of Williams back to the Commission for the purpose of developing standards by which to judge the reasonableness of oil pipeline rates. However, it should be pointed out that that decision did not prescribe a method for making that determination, nor did it preclude the Commission from adopting a method that continues to use valuation as a rate base. Answer to Protest and Petition for Investigation and Suspension, FERC Docket Nos. IS84-15-000 *et al.,* Sept. 21, 1984.

A-69-71). The court directed FERC to examine other ratemaking alternatives such as trended original cost. (App. A-65, 92). Petitioners simply have chosen to ignore the plain language of the court's decision in order to make the erroneous claim that the Court has mandated a specific methodology.[6]

Petitioners also claim that the Court of Appeals exceeded the scope of its authority in rejecting the Commission's rate of return methodology. (AOPL at 22; Texas Eastern at 14). A review of the Court of Appeal's decision belies this argument. After carefully examining the rationale and objectives of the chosen rate of return methodology (App. A.-73-76), the court concluded:

> We frankly cannot locate the rhyme nor reason of this rate of return methodology. . . . FERC made no attempt to estimate the risks involved with oil pipeline operations, and therefore could not reasonably estimate the rate of return required to maintain a viable oil pipeline industry. . . . [T]he total returns allowable under FERC's methodology have no discernible regulatory significance beyond the fact that they are bound to be very large.

[6]The court's conclusions regarding ratemaking methodology are fully consistent with the conclusions which had been reached in *Farmers Union I.* In that decision, the court rejected the ICC's view that the Valuation Act (49 U.S.C. §19a) mandated a valuation rate base, criticized the ICC for retaining a complex and outmoded system which had been born of "peculiar" historic circumstances, *Farmers Union I* at 418, found that the ICC's scheme encouraged double-counting of inflation, *Farmers Union I* at 421, and urged the ICC "to build a viable modern precedent for use in future cases that not only reaches the right result, *but does so by way of ratemaking criteria free of the problems that appear to exist in the ICC's approach.*" *Id.* (emphasis added). In the FERC decision at issue, the agency had *acknowledged* serious flaws in its largely ICC-derived rate base, but refused to accept either modification or alternatives.

(App. A-75-76). By not linking rate of return with risk (App. A-76-78), by failing to eliminate the double-count for inflation (App. A-78-81), and by defining "return on equity" in a completely unique and non-meaningful fashion (App. A-81-84), the Commission necessarily concocted a rate of return methodology that could not be reasonably related to the rate base calculation. The Court of Appeals correctly found these overwhelming shortcomings violative of this Court's holdings in, for example, *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944) and *Dayton Power and Light Co. v. Public Utilities Commission,* 292 U.S. 290 (1934). (App. A-85).

Petitioners similarly mischaracterize the role of the factual record in the agency's decision and in the court's subsequent order. Petitioners emphasize that the Commission had the benefit of a "voluminous" record and claim that the court erred in "re-trying" the key factual determinations made by the Comission. (AOPL at 15, 19; WPL at 4-5). However, on three crucial issues in which the court found the Commission's factual determination not to be substantially supported, the Commission failed to rely on the record at all.[7] Hence, petitioners' claims or intimations

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[7]First, FERC's conclusion that a radically different and more permissive scheme of regulation was required for oil pipelines than other industries operating under the standard of "just and reasonable" was accompanied by a "virtually complete failure to make any express references to the extensive record compiled in this case." (App. A-45 n.50). Second, FERC based its astonishingly permissive rates of return on the purported need to encourage investment for pipeline construction, yet the Commission wholly failed to support this critical premise with any reference to the record, "or any other source." (App. A-17, n.27). Finally, a critical factual predicate of FERC's rejection of traditional comparable risk analysis in determining the appropriate rate of return for oil pipeline investments was the assumption that investors in oil pipelines disregard comparative risks in making investments. As

(footnote continued on next page)

that the court failed to give proper deference to agency expertise and familiarity with the record should be disregarded.

In sum, the Court of Appeals' decision in this case is no more than the application of this Court's well-established standards of appellate review to a sweepingly broad decision in which the agency grieviously misconstrued its statutory mandate and established a ratemaking methodology contrary to the governing statute. This Court's prior decisions delineating the bounds of appellate review ought not, as the petitioners urge, create a "talisman under which any agency decision is by definition unimpeachable." *MVMA* at 462. The Court of Appeals left the Commission free on remand to exercise its informed discretion in conformance with the statute.

II. Williams Pipe Line Company's Due Process Claim Regarding the Ratemaking Treatment of its Purchase Price is Moot and Undeserving of Review by this Court.

WPL seeks review by this Court on the separate issue of whether it was denied procedural due process by the FERC and the Court of Appeals regarding rate base treatment of the price that WPL paid for acquisition of the physical plant of its system. This contention is both incorrect and not suitable for review by this Court.

In 1966, WPL purchased the properties of the Great Lakes Pipeline System at a price which greatly exceeded both the depreciated original cost and ICC valuation of

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[7] *(continued)*
the court found, however, this premise was pure assumption, completely unsupported by any evidence or economic common sense, and was completely rebutted by both extensive contrary evidence of record and by academic literature finding that oil pipeline investors do invest on the basis of relative risks. (App. A-59-63).

those properties. (App. B-196 n.324). In its decision, FERC announced the general rule that when a company purchases pipeline assets, the rate base would reflect only the depreciated original cost of those assets regardless of purchase price. (App. B-243). FERC also adopted an exception to this general policy by providing that a purchaser might show, affirmatively by clear and convincing evidence, that the acquisition conferred substantial benefits on the ratepayers. (App. B-243).

On brief before the Court of Appeals, FERC acknowledged that WPL would be accorded an opportunity in Phase II of the rate proceeding to demonstrate that its purchase fit within that exception. The Court of Appeals affirmed the general rule of exclusion (App. A-86-87), and stated that, "[o]n remand, Williams remains free to show that it falls within this exception." (App. A-22 n.34). Subsequent to the *Farmers Union II* decision, the presiding administrative law judge notified the parties of his intention to take evidence on whether WPL's purchase fit within the above exception to the general exclusion.[8]

Thus, WPL's argument that it was denied procedural due process due to lack of notice and hearing on the exclusion of its purchase price is moot. FERC, the Court of Appeals, and WPL itself have all recognized that in Phase II of this proceeding WPL will have an opportunity to demonstrate that its purchase price should be recognized for ratemaking purposes. Indeed, WPL's petition to this

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[8]In opposing the assessment of costs following *Farmers Union II*, WPL contended that it was a prevailing party with regard to the purchase price issue because the court "found Williams entitled to a further hearing." "Objection of Williams Pipe Line Company to Bill of Costs Submitted by Petitioners Farmers Union Central Exchange, Inc., *et al.*" *Farmers Union Central Exchange, Inc. v. FERC and U.S.A.*, No. 82-2412, filed March 30, 1984.

Court admits that the Court of Appeals "found Williams to be entitled to be heard in Phase II on whether it falls within the single exception contained in FERC's newly adopted general rule on pipeline transfers." (WPL at 28). This admission alone should be fatal to WPL's "notice" and "due process" claims.[9]

WPL essentially requests this Court to enter into a detailed, purely factual, investigation of whether or not the record before the agency and the Court of Appeals was sufficient for the agency's decision. Consideration of such a claim is inconsistent with the role and mandate of this Court.[10] Petitioner's request for a writ of certiorari on this issue should be denied.[11]

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[9]Williams' attempt to claim that this "limited right" is insufficient is an indirect and completely unsupported attack on the validity of the general rule regarding purchases.

[10]*Maynard v. Durham & Southern Railroad Company,* 365 U.S. 160, 164 (1961) (Frankfurter, J., dissenting) ("Again and again we deny petitions for certiorari which merely raise disputed issues of fact.") *See also, Sentilles v. Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 111 (1959) (Stewart, J., concurring). Williams' effort to obtain yet a third layer of review on this issue represents a type of petition condemned by this court. See *Magnum Import Company v. Coty,* 262 U.S. 159, 163, (1923). ("The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Finally, this ground for the petition is wholly lacking in any broad legal significance, any applicability to any other pending cases, and, "involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the respondent." *Butz v. Glover Livestock Commission Company,* 411 U.S. 182, 189 (1973) (Stewart, J. and Douglas, J., dissenting). This claim involves no "special and important reasons" sufficient to grant certiorari, and it is well settled that this Court does not "sit for the benefit of the particular litigants." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

[11]At the administrative level as well as before the Court of Appeals and this Court, WPL was the only pipeline to brief the WPL purchase price issue.

III. The Court of Appeals' Ruling on Income Tax Normalization is Consistent with Congressional Intent and Traditional Rate Regulatory Practice.

Consistent with policy followed generally by the FERC for its other jurisdictional activities and with policy followed by most other rate regulatory agencies, the FERC adopted a rule that in the event oil pipelines elect to use income tax normalization, the resultant deferred tax amounts must be deducted from the rate base used for calculating a pipeline's revenue requirement. (App. B-303-304). AOPL challenges the Court of Appeals' affirmance of the FERC action as "plainly erroneous" (AOPL at 24),[12] and argues that the Court of Appeals failed to understand that a rate base deduction of deferred tax amounts deprives a company of all the benefits of accelerated depreciation that Congress intended a company to have (AOPL at 29). AOPL's contention lacks a factual or legal basis and should be rejected.

Although asserting that rate base deductions are contrary to legislative intent, AOPL fails to cite any language so stating and does not acknowledge the existence of known legislative history that directly refutes its claim. When Congress gave regulated industries the option of using accelerated depreciation in the Tax Reform Act of 1969, it addressed the rate base deduction issue directly:

> Where normalization is used, this bill in no way diminishes whatever power the agency may have to require that the deferred taxes reserve be excluded from the base upon which the utility's permitted rate of return is calculated.

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[12]The other two petitioners did not appeal this issue.

H.R. Rep. No. 91-413, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S. Code Cong. and Ad. News 1784.[13]

AOPL further argues that if there is a rate base deduction requirement, an oil pipeline would be better off electing straight line treatment of depreciation. (AOPL at 26). That statement is directly contradicted by record evidence and the agency's finding that a deduction of deferred taxes from the rate base "enhances the regulated entity's cash flow." (App. B-304). The Court of Appeals agreed.[14] (App. A-91). Clearly, the AOPL's argument raises no issue that should be considered by this Court.

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[13]The AOPL also suggests that the decision to deduct deferred taxes may be in conflict with a decision of another circuit. (AOPL at 27-28). In its petition the AOPL refers to a Third Circuit decision in *Bessemer and Lake Erie Railroad Co. v. I.C.C.*, 691 F.2d 1104, 1116 (3d Cir. 1982) *aff'g Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *cert. den.*, 103 S.Ct. 2463 (1983). That decision is not in conflict with the present decision. The Third Circuit decision holds only that it is within the discretion of an agency not to require the deduction of deferred tax amounts. In that case, the ICC was concerned about the revenue adequacy of the railroads and, therefore, elected not to require the deduction of the deferred tax amounts from the rate base. No assertion has been made by the AOPL, nor could it be based on the record evidence, that the oil pipeline industry suffers from a revenue inadequacy of the type alleged to have existed in the railroad industry. In no way can the Third Circuit decision be read as stating that it is illegal and against Congressional intent to deduct deferred taxes from the rate base.

[14]Indeed, the AOPL's assertion flies in the face of simple logic. Regulated companies are not required to take accelerated depreciation; if they were actually better off taking straight line depreciation, they would do so. The fact that regulated companies across the nation continue to take accelerated depreciation despite the customary regulatory practice of deducting deferred tax amounts from the rate base shows the lack of merit in the AOPL's assertion. For example, in the latest annual survey of regulatory practice, the National Association of Regulatory Utility Commissioners found that the universal practice of state regulatory commissions that utilize income tax

(footnote continued on next page)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 29, 1984

[14]*(continued)*
normalization is to require the rate base deduction of deferred taxes. 1982 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners, Table 47.

EXHIBIT 1

Pursuant to Rule 28.1, the following is a list of affiliates and subsidiaries of respondents Farmers Union Central Exchange, Inc., Farmland Industries, Inc., Kerr-McGee Refining Corporation, and National Cooperative Refinery Association, as of the date of this filing.

Farmers Union Central Exchange, Inc.

Cenex AG, Inc.
Cenex, Inc.
Cenex, Ltd.
Cenex Petroleum, INc.
Cenex Service Company
Full Circle, Inc.
Pax Company

Farmland Industries, Inc.

Farmland Industries International, Inc.
Farmland Industries U.K., Ltd.
Far-Mar-Co, Inc.
Far-Mar-Co Export Elevator Company
Far-Mar-Co Grain Marketing, Inc.
Far-Mar-Co International, Ltd.
Farmland World Trade Company
Farmland Food, Inc.
Cooperative Farm Chemicals Association
Farmers Chemical Company
Farmland Securities Company
Cooperative Service Company
The Cooperative Finance Association, Inc.
Farmland Insurance Agency, Inc.
National Cooperative Refinery Association
Kansas City Terminal Elevator Company

Kerr-McGee Refining Corporation

Benedum-Trees Oil Company
Bighole Drillers, Inc.
Cato Oil and Grease Co.
Edgebrook Development Corporation
Franjo, Inc.
Jacobs Land & Livestock Co.
Kermac Contractors, Inc.
Kermac Nuclear Fuels, Inc.
Kerr-McGee Australia, Ltd.
Kerr-McGee Building Corporation
Kerr-McGee Chemical Corporation
Kerr-McGee Coal Corporation
Kerr-McGee Corporation
Kerr-McGee Credit Corporation
Kerr-McGee Eastern Company
Kerr-McGee Finance (Curacao) N.V.
Kerr-McGee Foundation, Inc.
Kerr-McGee of Canada Northwest, Ltd.
Kerr-McGee of Indonesia, Inc.
Kerr-McGee Oil (U.K.) Limited
Kerr-McGee Pipeline Corp.
Marine Resources Insurance Limited
Mine Contractors, Inc.
Nemo Pipeline Compnay
Nueces Realty Company
Quivira Mining Company
Sequoiah Fuels Corporation
Sunningdale Oils Limited
Transworld Drilling Company, Limited
Triangle Refineries, Inc.
White Shoal Pipeline Corporation

National Cooperative Refinery Association

Jayhawk Exploration, Inc.
Clear Creek, Inc.
Clear Creek Transportation, Inc.
NCRA Sales & Service, Inc.
NCRA G, Inc.
NCRA Congo, Inc.